In The

Supreme Court of the United States

October Term, 1978

NO. 78-1595

GEORGE CALVIN LEWIS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals is reported in *United States of America* v. *George Calvin Lewis, Jr.*, 591 F.2d 978 (4th Cir. 1979), and is reproduced in the Appendix. The Fourth Circuit's unreported order denying rehearing is in the appendix at App. 13.

JURISDICTION

The Fourth Circuit decided Lewis's appeal on January 24, 1979, and judgment was entered that date. A petition

for rehearing and motion for stay of mandate were timely filed. On March 19, 1979, rehearing was denied, and the Court stayed the issuance of mandate for 30 days to permit filing for a petition for certiorari. The petition was filed on April 18, 1979, and certiorari was granted on June 18, 1979. Jurisdiction to review the decision of the Court of Appeals is conferred by 28 U.S.C. § 1254.

QUESTION

The question presented is whether a conviction in violation of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), may be used to support a subsequent conviction under Title 18 U.S.C. App. § 1202(a)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions, treaties, statutes, ordinances, or regulations involved are:

(A) The Constitution of the United States of America, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

(B) Title 18 U.S.C. App. §1202 (a)(1): "Any person who—(1) has been convicted by a court of the United States or of a state or any political subdivision thereof of a felony * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000, or imprisoned for not more than two years, or both."

STATEMENT OF THE CASE

George Calvin Lewis, Jr. was tried in the United States District Court for the Eastern District of Virginia on December 22, 1977. The two-count indictment charged Lewis with receipt of a firearm having previously been convicted of a felony, in violation of Title 18 U.S.C. § 922(h)(1), and receipt and possession of a firearm having previously been convicted of a felony in violation of Title 18 U.S.C. App. § 1202(a)(1).

On the day of the non-jury trial, counsel for Lewis, in a request for a continuance, told the District judge that the prior convictions relied on by the government were convictions obtained in violation of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

Counsel stated that Lewis had been charged with the same offense as Gideon (breaking and entering with intent to commit a misdemeanor), and was tried in the same state (Florida) about six months before Gideon was tried. Counsel told the District judge that he had called an attorney in Florida who checked the Court records on Lewis's convictions, and that these records showed affirmatively that Lewis had no lawyer. Counsel then made a proffer of indigency. (App. 2).

The District Court ruled that the invalidity of the convictions was immaterial. Accordingly, no proof of the *Gideon* violation was presented. (App. 9). Lewis was acquitted on the charge under 18 U.S.C. § 922(h)(1), but was convicted under 18 U.S.C. App. § 1202(a)(1). A panel of The United States Court of Appeals for the Fourth Circuit affirmed the conviction, with one judge dissenting.

SUMMARY OF ARGUMENT

Gideon v. *Wainwright*, 372 U.S. 335 (1963) established the right of indigent defendants in state felony prosecutions

to legal representation. In cases following *Gideon,* this Court has forbidden the use of uncounselled felony convictions for enhanced punishment under recidivist statutes, impeachment and in the sentencing process.

In this case, a prosecution under 18 U.S.C. App. § 1202 (a)(1), for possession of a firearm by a convicted felon, counsel for petitioner represented to the District Court, in a request for a continuance, that the records of the state proceeding showed affirmatively Lewis had no lawyer. The Court denied the motion, ruling that it was immaterial whether Lewis had a lawyer in the prior, underlying proceeding.

There is no evidence that Congress intended Section 1202(a)(1) to embrace persons of Lewis's status, i.e. convicted of felonies in violation of *Gideon, supra.* Further, the statute should be read to avoid a construction that would render it unconstitutional. *United States Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548 (1973).

In any event, the use by the government in this case of prior uncounselled convictions to support a finding of a violation of Title 18 U.S.C. App. § 1202(a)(1) was constitutionally impermissible and denied Lewis again the protection of the Sixth Amendment. Lewis's conviction and its affirmance by a divided Court of Appeals represent a retreat from the principles of *Gideon, supra; Burgett* v. *Texas,* 389 U.S. 109 (1967); *United States* v. *Tucker,* 404 U.S. 443 (1972), and *Loper* v. *Beto,* 405 U.S. 473 (1972).

ARGUMENT

In *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), this Court held unanimously that indigent defendants in state felony prosecutions have the right to court-appointed counsel. In the sixteen years since then, this Court has remained steadfast to that principle.

In *Burgett* v. *Texas,* 389 U.S. 109 (1967), the Court held impermissible the use of a prior conviction obtained in violation of *Gideon* in a prosecution under a recidivist statute. "Worse yet," the Court said, "since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at 115.

In *United States* v. *Tucker,* 404 U.S. 443 (1972), the Court held that uncounselled convictions could not be considered in sentencing. Lastly, in *Loper* v. *Beto,* 405 U.S. 473 (1972), it was held that the use of a prior uncounselled conviction to impeach a defendant violated his constitutional safeguards. Such convictions, this Court said, "lacked reliability." 405 U.S. at 484.

The holding of the Court of Appeals presents this strange situation: When Lewis took the witness stand, his prior convictions obtained in violation of *Gideon* could not be used to impeach his testimony, nor could the Court, after finding guilt, consider the prior convictions in imposing a penalty. Yet, the very same convictions formed the basis for guilt. Such a result, we suggest, does not make sense.

The panel majority stated Congress's intent in enacting Section 1202(a)(1), "as the legislative history as well as the statutory language itself makes clear, is that any person within this status class of a convicted felon, whose conviction was not facially invalid and whose conviction had 'not been invalidated as of the time the firearm is possessed' is subject to the statutory prohibition . . ." (App. 15). Rely-

ing on its earlier holding in *United States* v. *Allen,* 556 F.2d 720 (4th Cir. 1977), which was a prosecution under 18 U.S.C. § 922(a)(6) for falsification in the acquisition of a firearm, the majority concluded that *Burgett, supra,* should not be read "so broadly" as to prohibit prosecution in Lewis's case. (App. 18).

However, no such Congressional intent can be inferred. As this Court observed in *United States* v. *Bass,* 404 U.S. 336, 344 (1971):

> Title VII was a last-minute Senate amendment to the Omnibus Crime Control and Safe Streets Act. The Amendment was hastily passed, with little discussion, no hearings, and no report.

See also, *United States* v. *Batchelder,* 442 U.S. . . . (1979). As Judge Winter stated in his dissenting opinion (App. 22),

> It is therefore doubtful that Congress gave full consideration either way to the matter of the constitutional validity of the prior felony conviction. * * * In any event, it is axiomatic that a statute should be read, if possible, to avoid a construction that would render it unconstitutional. See, e.g., United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 571 (1973); United States v. Vuitch, 402 U.S. 62, 70 (1971). In my view, the majority's construction of §1202(a) runs afoul of that rule.

The opinion by the majority conceded two things. First, it indicated that if Lewis's convictions were "facially" invalid, Lewis could not be convicted under Section 1201 (a)(1). Secondly, it suggested that had Lewis had his conviction invalidated there could be no prosecution. (App. 20).

We respectfully submit that "facial invalidity" is a standard of no value in determining whether a defendant is to

be accorded the protection of *Gideon* and subsequent cases. Either Lewis had a lawyer or he did not. The fact that the government's proof recites the absence or presence of counsel, or, as here, is silent on that score, does not make the government's case any stronger or the use of such a conviction any less foul.[1]

It would have been simple to have the Florida court records produced, as counsel for Lewis suggested. At no time has the government suggested that Lewis had a lawyer at his Florida trial. In fact, Lewis was convicted in the same state as Gideon several months before Gideon was convicted. We believe, too, that it is important that the constitutional defect alleged was a pure violation of *Gideon,* and not an impediment like ineffective assistance of counsel, unreasonable search, denial of speedy trial, or the like. More than fifteen years have passed since this Court's decision in *Gideon,* and granting Lewis the protection he seeks here will hardly burden the judicial process by requiring a multitude of "mini-trials."

Furthermore, as Judge Winter pointed out in his dissent, "I do not understand, as the majority asserts, that defendant concedes the 'facial' validity of his earlier conviction. He asserts that the record of that conviction shows that he was unrepresented by counsel and that the conviction is void on it face." (App. 21). Counsel, indeed, had informed the District Court as follows. (App. 2):

> I called a lawyer in Florida by the name of Harper who is in Clearwater where this case was tried. Mr. Harper

[1] In Lewis's Petition for Certiorari, on Page 4, we stated that the government's proof on the prior conviction consisted of a prison record, not the court records. This statement is incorrect. The government introduced properly attested copies of orders of the Florida Court. (Appendix 10). These orders do not mention the presence of an attorney, however, and counsel for Lewis represented that the full record showed positively Lewis had no attorney.

went to the Court, to the records of the county or circuit court where this gentleman was tried. He gave me the following information:

Number one, the record affirmatively shows that he was not represented. It is not a silent record. It affirmatively shows no lawyer.

He was asked by the trial judge on the date of trial, "Do you have a lawyer?" His response was, "No, I do not." We would proffer evidence that he was in fact indigent at that time. The judge proceeded to try him on that day. He ordered a pre-sentence investigation of some nature or another. Continued sentencing.

The government's proof of the convictions are the orders on the day of sentencing. (App. 10). We submit that to label these convictions "facially valid" and thus allege some kind of distinction is to play word games with a fundamental constitutional guarantee.

As stated earlier, the panel majority implied that had Lewis, prior to possessing the firearm, had his conviction set aside, then he could not have been prosecuted under Section 1202(a)(1). We agree, but we hardly see how the formality of expungement should be of any consequence. Again, either Lewis had a lawyer or he did not.

The Circuits are divided on whether a defendant in a prosecution for receipt, transportation, or possession of a firearm in violation of 18 U.S.C. 922(g)(1), 922(h)(1) or App. 1202(a)(1) may assert as a defense the unconstitutionality of an underlying conviction. (See the cases collected in Footnote 10 of the majority opinion below, (App. 19). But the Fourth Circuit is the first Circuit to hold that such a defense is not available when the constitutional impediment is denial of any representation. In *United States* v. *Lufman*, 457 F.2d 165 (7th Cir. 1972), and *United States* v. *Thoreson*, 428 F.2d 654 (9th Cir. 1970)

courts have correctly held that convictions in violation of *Gideon, supra,* may not underlie prosecutions of this type.

The reliance of the Fourth Circuit on its earlier decision in *United States* v. *Allen,* 556 F.2d 720 (4th Cir. 1977) is misplaced. *Allen* involved a prosecution for falsification in the purchase of a firearm under 18 U.S.C. § 922(a)(6). Assuming *Allen* was correctly decided, the Fourth Circuit emphasized that Section 922(a)(6) did "not penalize Allen for his possibly invalid prior conviction, but for lying about them. . ." (p. 724).

We respectfully submit that the decision below is a retreat from *Gideon, supra* and *Burgett, supra*. Like Burgett, Lewis's "right to counsel, a 'specific federal right,' is being denied anew. This Court cannot permit such a result unless *Gideon* v. *Wainwright* is to suffer serious erosion." *Burgett, supra,* at 325.

CONCLUSION

For the foregoing reasons the petitioner respectfully requests that the judgment of The Court of Appeals for the Fourth Circuit be reversed.

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CERTIFICATE

I certify that three copies of this Brief were mailed first class, postage prepaid, to Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530.

ANDREW W. WOOD